SUPREME COURT, U. S.

No. 1365

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IN THE

Supreme Court of the United States

October Term, 1966

ANGELO MINICHIELLO,

Petitioner,

v.

ROYAL BUSINESS FUNDS CORP.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, County of New York

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1363

ANGELO MINICHIELLO,

Petitioner,

v.

ROYAL BUSINESS FUNDS CORP.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, County of New York

RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported at 18 N.Y.2d 521, 277 N.Y.S.2d 268, 223 N.E.2d 793 (1966), and is printed in Petitioner's Appendix, pp. 4a-8a.

The opinion of the Supreme Court of the State of New York, Appellate Division, First Department, is reported at 25 App. Div. 2d 502, 266 N.Y.S.2d 570 (1st Dep't 1966), and is printed in Petitioner's Appendix, pp. 12a-15a.

The opinion of the Supreme Court of the State of New York, County of New York (Hon. Frederick Backer), is reported at 47 Misc. 2d 310, 262 N.Y.S.2d 708 (Sup. Ct. N.Y.Co. 1965), and is printed in Petitioner's Appendix, pp. 16a-18a.

Jurisdiction

The decision of the New York Court of Appeals was rendered on December 30, 1966. Petitioner's motion for reargument was denied on March 2, 1967 (19 N.Y.2d 750; Petitioner's Appendix, p. 9a), and the petion was filed with this Court on May 5, 1967.

The jurisdiction sought to be invoked is 28 U.S.C. §1257(3). Respondent submits that there is no jurisdiction to review the judgment below since the federal question purported to be raised was not timely presented to the New York Court of Appeals.

Questions Presented

1. Did petitioner properly raise in the State Court the claim which he now asserts based on the Impairment Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

2. Is the State's highest court, in considering the interpretation of a state statute for the first time, foreclosed by the Impairment Clause from interpreting the statute in accordance with the legislative intent simply because the intermediate appellate state courts had interpreted the statute erroneously for a period of years?

Reasons for Denying the Petition

I

The federal claim asserted in the petition, that the decision of the New York Court of Appeals by necessary implication gave retroactive effect to the 1964 amendment of the New York Statute of Frauds (N. Y. General Obligations Law §5-701(10)), was raised for the first time in petitioner's motion for reargument in the Court of Appeals. Although respondent had moved to dismiss the complaint in the Trial Court on the ground that the 1949 Statute of Frauds (N. Y. Personal Property Law §31(10)) barred petitioner's claim, and had argued consistently in the Trial Court, in the Appellate Division, and in the Court of Appeals that the original Statute of Frauds should be interpreted to bar petitioner's claim, petitioner now apparently asserts that the unanimous decision by the New York Court of Appeals was entirely unforeseeable. The federal claim advanced by petitioner for the very first time on his motion for reargument, and now pressed in the petition, quite obviously should have been raised, if meritorious, in the Trial Court, and at least in the Appellate Division, or even at the principal argument in the Court of Appeals. It is established law that a federal question raised for the first time on a petition for rehearing or reargument in the State's highest court, when such an argument could have been anticipated at an earlier stage, comes too late. *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 128-29 (1945); *American Surety Co.* v. *Baldwin,* 287 U.S.

156, 163-64 (1932); *McMillen* v. *Ferrum Mining Co.*, 197 U.S. 343, 347 (1905). Here the New York Court of Appeals denied petitioner's motion for reargument without opinion, having no reason to consider this newly raised federal question. That Court may well have refused to pass on the merits of a claim not timely raised. See Cohen & Karger, POWERS OF THE NEW YORK COURT OF APPEALS, §169 (Rev. ed. 1952). There is no reference at all in the remittitur of the New York Court of Appeals (Petitioner's Appendix, pp. 1a-3a) which notes, as is common practice for that Court, that a federal question was presented and rejected on the merits. Petitioner has totally failed to offer any reason why the State court judgment is not based on an adequate and independent non-federal ground, and this Court should therefore refuse to accept jurisdiction. *Citizens National Bank* v. *Durr*, 257 U.S. 99, 106 (1921).

II

Petitioner concedes (Petition, p. 9n.) that the statute involved in this case is unique, and that the decision sought to be reviewed has applicability only to those actions for broker's or finder's fees in which the claim arose prior to the enactment of the 1964 amendment to the New York Statute of Frauds. Petitioner's lengthy petition sets forth only one ground for seeking review by this Court—that New York's highest court erroneously decided a question of New York law. This he strains into a federal constitutional argument by contending that the only conceivable basis for the New York court's decision is that that Court must have

given retroactive effect to a subsequent statute. This claim surely does not meet the standards outlined in Rule 19 of this Court to justify the granting of a Writ of Certiorari.

III

Whether the petitioner denominates his claim for a broker's or finder's fee as being a contract subject to the protection of the Impairment Clause (Article I, §10), or a property right subject to the protection of the Due Process Clause of the Fourteenth Amendment, his legal analysis is the same—that the New York Court of Appeals disingenuously purported to construe the 1949 Statute of Frauds when in actuality that Court was applying the 1964 amendment retroactively. Petitioner concedes (Petition, p. 12), and a reading of the opinion below makes apparent (Petitioner's Appendix, pp. 4a-8a), that the Court of Appeals expressly based its decision on a construction of the words of the earlier statute in light of the legislative purpose sought to be achieved. It is also undisputed that the Court of Appeals was construing subdivision 10 of the 1949 Statute of Frauds for the first time in this case, thus rendering hollow petitioner's argument that he was deprived of any contractual or property rights by a "change" in the law. Only if the earlier statute were patently susceptible of no other reading than that attributed to it by petitioner, and the unanimous opinion of the Court of Appeals legally indefensible, could petitioner's argument have any possible merit. See *Terre Haute & I.R.R.* v. *Indiana ex rel. Ketchum,* 194 U.S. 579, 589 (1904) (quoted in Petition, pp. 13-14).

An identical argument was rejected by this Court in *Stockholders of the Peoples Banking Co.* v. *Sterling,* 300 U.S. 175 (1937). In that case, the Maryland Legislature passed a statute to implement a state constitutional provision which gave creditors of state banks certain rights against bank stockholders. The Maryland Legislature later amended that statute, and it was claimed that the Maryland Court of Appeals had altered the liability of bank stockholders retroactively in accordance with the amended statute. This Court rejected that argument:

> "Nor would it help the appellants anything to assume in their behalf that the Constitution of the State has been given a new meaning, if the new meaning is not due to the compulsion of a statute. Change by judicial construction of antecedent legislation does not impair a contract, at least in the forbidden sense, if it be granted *arguendo* that such a change can be discovered. *Tidal Oil Co.* v. *Flanagan,* 263 U.S. 444, 450; *Fleming* v. *Fleming,* 264 U.S. 29, 31; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673, 680; *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358, 364. The new meaning, if there is any, is not ascribed to the Constitution because a later staute has said it must be done. *The new meaning is the product of the independent judgment of a court.* So the state court has told us, and the good faith of its declaration is not successfully impeached. *Broad River Power Co.* v. *South Carolina,* 281 U.S. 537, 540. To changes thus wrought the Constitution of the United States does not offer an impediment." (300 U.S., at 182-83) (Emphasis added.)

It is obvious that in this case the Court of Appeals was exercising its "independent judgment" in interpreting the 1949 statute, and that the interpretation put on the 1949 statute was not due to the compulsion of the 1964 amendment. At best, the State Court only used the 1964 amendment as a guidepost or indicium of prior intent, but such a use is entirely consistent with constitutional principles. See, *e.g.*, *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 541-42 (1962); *Federal Housing Administration* v. *Darlington, Inc.*, 358 U.S. 84, 99 (1958); *Chatlos* v. *McGoldrick*, 302 N.Y. 380, 388, 98 N.E.2d 567, 571 (1951). The language of the 1949 statute entirely supports the interpretation given to it by the Court of Appeals; more importantly, the legislative purpose, as reflected in the legislative history underlying that enactment, is consistent only with that Court's unanimous decision. (The pertinent portions of the 1949 Law Revision Commission Report and Study are printed as Appendix A herein, and the entire 1964 Law Revision Commission Report is printed as Appendix B herein.)

Respondent recognizes that it is not the function of this brief to argue the merits of the decision below, but merely to focus on the importance, or lack of importance, of this case as a means of clarifying and protecting federal constitutional rights. Petitioner has devoted most of his brief, however, to an exhaustive review of New York law in an attempt to impugn the unanimous decision of New York's highest court on a question of New York law. The dissenting opinion in

the Appellate Division (Petitioner's Appendix, pp. 12a-15a) and the opinion of the Court of Appeals (*id.* pp. 4a-8a) amply meet petitioner's arguments.

CONCLUSION

The petition for a Writ of Certiorari to the Supreme Court of the State of New York, County of New York, to review an order and decision of the Court of Appeals of the State of New York should be denied.

June 5, 1967.

Respectfully submitted,

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APPENDIX A

Recommendation of the Law Revision Commission to the Legislature

Relating to the Enactment of a Statute of Frauds Covering Claims for Brokers' Commissions 1949 Leg. Doc. No. 65(G)

In recent years there have been a substantial number of reported cases of claims for commissions for services rendered in the sale of a going business or a business opportunity. Under existing law there is no requirement that business brokers' contracts for commissions be in writing. The nature of the transactions is such that, in the absence of the requirement of a writing, unfounded and multiple claims for commissions are frequently asserted, and employers often seek to escape liability by denying the fact of employment. These controversies are commonly resolved by juries on conflicting testimony, with the consequent danger of erroneous verdicts.

Business brokers are fairly numerous in New York; the classified telephone directory for the Borough of Manhattan lists "Business Brokers" for a page and a half. Some, but by no means all, are also real estate brokers. In some states "business opportunity brokers" are required to obtain licenses similar to or identical with those required of real estate brokers; in others, statute of frauds provisions covering real estate brokers' commissions are held applicable to commissions on the sale of a business together with an interest in real estate.

The claims of business brokers are often closely related to real estate brokerage, since the sale of a busi-

ness commonly involves the transfer of a lease or other interest in real property. Article 12-A of the Real Property Law, first enacted in 1922, requires real estate brokers to obtain licenses from the Secretary of State. The negotiation of a loan upon real estate is covered by that Article, but in *Weingast* v. *Rialto Pastry Shop,* 243 N. Y. 113 (1926), it was held that the sale of a restaurant with an incidental transfer of a lease of real property was not within the Article. Of course no license is necessary when real estate is not involved. Thus neither license nor writing is necessary to a business brokers' action for commissions under present law.

The Commission believes that the Statute of Frauds, section 31 of the Personal Property Law, should be made applicable to contracts for compensation for services rendered in the sale of a business opportunity, business, or interest therein. The proposal hereafter made makes it clear that a transfer of an interest in a business through the creation of a partnership or the sale of a majority of the voting stock interest in a corporation is included.

* * *

Nevertheless, claims for commissions by real estate brokers often result in disputes over the fact of employment. Such disputes do not necessarily arise out of misconduct; in the absence of a memorandum honest misunderstanding often arises. Moreover, broker as well as owner may be exposed to the risk of an unjust jury verdict on disputed oral testimony.

* * *

Appendix A

Oral Contracts for Commissions *

I. Introduction

It was suggested to the Law Revision Commission some years ago that there should be legislation, similar to the Statute of Frauds, requiring that claims for commissions for negotiating such transactions as a loan or the sale of a business be supported by a written memorandum signed by the party to be charged. The basis for the suggestion was a feeling that the absence of such legislation permitted business men to be harassed by unfounded claims for commissions on transactions where they had not intended to engage any agent, or had not intended to engage the agent making the claim. In connection with the suggestion, the question was raised whether such a requirement should be made applicable to claims for real estate commissions, in view of the fact that real estate brokerage is now a licensed occupation.

Such a proposal, so far as it relates to real estate brokerage, is no novelty either in New York or elsewhere. Commissions on the negotiation of loans seem not to have provoked comparable legislative activity; but loans secured by mortgages on real estate are closely related to real estate brokerage. Commission claims by what may be called "business opportunity brokers" have produced legislation in some states requiring such brokers to obtain licenses like those required of real estate brokers. Other claimants of com-

* This study was made at the direction of the Law Revision Commission by Professor Robert Braucher, of the Harvard Law School, Research Consultant.

missions, such as insurance brokers, commission merchants, auctioneers and others, seem not fairly within the scope of the proposal studied; their claims are more likely to arise out of a regular course of dealing, and any legislation requiring written memoranda would have to fit into a somewhat different framework of existing New York statutes.

Accordingly, this study deals first with real estate transactions, then with loans and the purchase and sale of businesses and business opportunities, and finally with existing statutes relating to other commission claims.

* * *

Most of the statutes, like the New York Statute of Frauds provisions, make non-complying contracts void or invalid. A few follow the traditional English form, "No action shall be brought . . . unless . . ."; the New Jersey form is "no broker . . . shall be entitled to any commission . . . unless . . . ". Regardless of the form, it seems now to be uniformly held that the broker's full performance does not entitle him to recover commissions without complying with the statutory requirement of a memorandum. Nor may he recover the reasonable value of his services on a theory of unjust enrichment. In the leading case, *Hale* v. *Kreisel*,[60] a

[60] 194 Wis. 271, 215 N. W. 227 (1927), overruling Seifert v. Dirk, 175 Wis. 220, 184 N. W. 698 (1921). *Accord:* Butterfield v. MacKenzie, 37 Ariz. 227, 292 Pac. 1097 (1930); Skinner v. Red Lodge Brewing Co., 79 Mont. 292, 256 Pac. 173 (1927); Goen v. Hamilton, 159 S. W. (2d) 231 (Tex. Civ. App. 1942); Baugh v. Darley, 184 P. (2d) 335 (Utah 1947); Hooson Ltd. v. Querengesser, [1941] 3 W .W. R. 880 (Alberta); see Restatement, Contracts, §355 (3), Ill. 7; Notes, 17 A. L. R. 891 (1922); 56 A. L. R. 783 (1928), collecting cases from California, Idaho, Indiana, Michigan, Nebraska, New Jersey, Oregon, Utah, Washington.

contrary Wisconsin decision was overruled on the ground that "the application of the rule which permits recovery upon quantum meruit to the case of real estate brokers absolutely nullifies these statutes."

* * * *

Under this statute a subsequent decision to introduce a mortgage into the transaction does not make the statute applicable, if the negotiations for which compensation is sought did not have a mortgage in view.[88] But if a mortgage loan is the object, an unlicensed broker cannot recover commissions on the theory that he merely procured an introduction to a lender instead of negotiating the loan.[89]

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[88] Seckendorff v. Halsey, Stuart & Co., Inc., 229 App. Div. 318, 241 N. Y. Supp. 300 (1st Dep't. 1930).

[89] Baird v. Krancer, 138 Misc. 360, 246 N. Y. Supp. 85 (Sup. Co., N. Y. Co. 1930). . . .

APPENDIX B

1969 Report of the Law Reform Commission

APPENDIX B

1964 McKinney's Session Laws of New York, p. 1796
Report of the Law Revision Commission
1964 Leg. Doc. No. 65(F)

Business Brokers' Oral Contracts for Finders Commissions

Section 5-701 of the General Obligations Law, formerly section 31 of the Personal Property Law, is commonly known as the Statute of Frauds. It specifies ten classes of contract which are "void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent." Subdivision ten was added in 1949 on the Recommendation of the Law Revision Commission for the stated purpose of providing "that contracts or agreements for the compensation of business brokers must be evidenced by a memorandum in writing and signed by the party to be charged."

In recommending the statute, the Commission relied on the decision in Baird v. Krancer, 138 Misc. 360, 246 N.Y.S. 85 (1930), where the court said, "A broker 'negotiates' just as much when he brings parties together in such frame of mind that they can by themselves evolve a plan of procedure, as when he himself carries on the discussion and personally induces an agreement to accept a specific provision." But decisions of lower courts under the statute have drawn a distinction between a "finder" and a "broker" and have refused to apply the statute to a contract for an "originating commission for services rendered merely in bringing a buyer and seller together."

In one such decision, Ames v. Ideal Cement Co., 37 Misc. 2d 883, 235 N.Y.S. 2d 622 (1962), the court said that the distinction may seem "anomalous," and expressed the opinion that the subject should be reviewed. The Commission has therefore reviewed the subject, and recommends that the statute be amended to make clear what was intended.

Review of the subject also discloses that the statute has been construed by the lower courts of New York not to preclude a claim for the reasonable value of services rendered under an oral contract, on a theory of "quantum meruit" or unjust enrichment. In recommending the statute, the Commission relied on a uniform current of authority, under similar statutes in other states, denying such claims on the ground that "the application of the rule which permits recovery upon quantum meruit to the case of real estate brokers absolutely nullifies these statutes." Hale v. Kreisel, 194 Wis. 271, 215 N.W. 227 (1927), quoted in Leg. Doc. (1949) No. 65 (G), p. 22. The Commission therefore recommends an amendment to make clear that no recovery on a quantum meruit theory was intended.